

CCRB INVESTIGATIVE RECOMMENDATION

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|---|-------------------------------------|---------------------------|--|------------------------------------|---------------------------------|
| Investigator: Ariel Courage | Team: Squad #6 | CCRB Case #: 201601572 | <input checked="" type="checkbox"/> Force | <input type="checkbox"/> Discourt. | <input type="checkbox"/> U.S. |
| | | | <input checked="" type="checkbox"/> Abuse | <input type="checkbox"/> O.L. | <input type="checkbox"/> Injury |
| Incident Date(s) Saturday, 02/20/2016 10:10 PM | Location of Incident: § 87(2)(b) | Precinct: 101 | 18 Mo. SOL 8/20/2017 | EO SOL 8/20/2017 | |
| Date/Time CV Reported Sat, 02/20/2016 10:27 PM | CV Reported At: IAB | How CV Reported: Phone | Date/Time Received at CCRB Fri, 02/26/2016 11:01 AM | | |

| Complainant/Victim | Type | Home Address |
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| Witness(es) | Home Address |
|-------------|--------------|
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| | |

| Subject Officer(s) | Shield | TaxID | Command |
|--------------------------|--------|--------|---------|
| 1. SGT Christophe Felton | 3999 | 932629 | 101 PCT |
| 2. POM Joseph Foss | 30244 | 950434 | 101 PCT |

| Witness Officer(s) | Shield No | Tax No | Cmd Name |
|--------------------------|-----------|--------|----------|
| 1. SGT Timothy Wong | 3795 | 947615 | 101 PCT |
| 2. POM Frank Orourke | 12745 | 954196 | 101 PCT |
| 3. POM Brian Fechtman | 11145 | 954800 | 101 PCT |
| 4. POM Neil Cusick | 03048 | 948839 | 101 PCT |
| 5. POM James Devane | 04046 | 955875 | 101 PCT |
| 6. POM William Roehrig | 14610 | 956216 | 101 PCT |
| 7. POM William Bloodnick | 17318 | 958316 | 101 PCT |
| 8. POM Louis Camerada | 28508 | 950143 | 101 PCT |

| Officer(s) | Allegation | Investigator Recommendation |
|-------------------------|---|-----------------------------|
| A.POM Joseph Foss | Force: Police Officer Joseph Foss used pepper spray against § 87(2)(b) and individuals. | |
| B.SGT Christophe Felton | Abuse: Sergeant Christopher Felton entered and searched § 87(2)(b) in Queens. | |

Case Summary

On February 20, 2016, § 87(2)(b) called 911 to report this complaint (BR 01). 911 connected § 87(2)(b) to IAB. The complaint was referred to the CCRB on February 26, 2016.

On February 20, 2016, § 87(2)(b) the resident of § 87(2)(b), in Queens, was throwing a birthday party at that location. Her relatives, § 87(2)(b) and § 87(2)(b) her acquaintance, § 87(2)(b) and a friend of § 87(2)(b) as well as numerous unidentified others, were in attendance.

At 9:56 p.m., two other residents in different apartments of the building called 911 to complain of the noise level and of a fight in the building. Officers from the 101st Precinct responded, including PO Joseph Foss and his partner, PO John Devane, and PO William Roehrig and his partner, PO Louis Camerada.

PO Foss discharged his pepper spray at § 87(2)(b) and multiple other unidentified individuals (**Allegation A**) in the § 87(2)(b) floor hallway.

Sgt. Christopher Felton of the 101st Precinct responded to the scene after the pepper spray was discharged, and allegedly entered § 87(2)(b) (**Allegation B**). This incident resulted in no summonses and no arrests.

§ 87(2)(b) provided two video files she recorded of the incident (BR 02 and 03; summary at BR 04), § 87(2)(g)



201601572_20160427_1723_DM.mp4



201601572_20160427_1718_DM.mp4

Mediation, Civil and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- On April 27, 2016, a Notice of Claim request was submitted to the Comptroller's office (BR 05). The results will be added to the case file upon receipt.
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

Civilian and Officer CCRB Histories

- This is the first CCRB complaint filed by § 87(2)(b) and § 87(2)(b) (BR 07 and 36).
- PO Foss has been a member of the service for four years. There are six allegations against him stemming from three prior cases that occurred between 2012 and 2015. None of these allegations has been substantiated, § 87(2)(g)
- Sgt. Felton has been a member of the service for 12 years. There are three allegations against him stemming from one prior complaint that occurred in 2010. None of these allegations was substantiated, § 87(2)(g)

Potential Issues

- § 87(2)(b) did not cooperate in this investigation. On March 1, 2016, the investigation established contact with § 87(2)(b) who scheduled to provide an in-person statement on March 2, 2016. On March 1, 2016, § 87(2)(b) appointment details were sent to him via text and email, and a please-call letter was mailed to § 87(2)(b) address to ensure he had the CCRB's contact information. § 87(2)(b) missed his appointment on March 2, 2016, without providing cancellation notice. On March 2, 2016, the undersigned called § 87(2)(b) § 87(2)(b) § 87(2)(b) rescheduled to provide an in-person statement on March 7, 2016, with § 87(2)(b) On March 2, 2016, a missed appointment letter edited to include § 87(2)(b) new appointment information was sent to § 87(2)(b) via mail and email. On March 7, 2016, § 87(2)(b) missed this second appointment without providing cancellation notice. As such, no in-person statement was obtained from him.
- § 87(2)(b) called 911 shortly after this incident to request an ambulance and to file a complaint, and was transferred to IAB. In addition to this call, another individual, who provided her name to the 911 operator as § 87(2)(b) called 911 to request ambulances to the scene, but hung up before she provided further information. It was not clear if she was a witness or a victim. Between March 10, 2016 and March 28, 2016, five calls were placed to the number that § 87(2)(b) used to make this phone call. Each time, either a voice message was left or the line rang continually before being forward to a busy signal. On April 29, 2016, the female associated with this number, who identified herself as § 87(2)(b) contacted the CCRB. § 87(2)(b) explained that while her phone was registered under the name § 87(2)(b) the phone belonged to her, and that her service had been turned off and she had therefore not received the messages left for her until now. § 87(2)(b) provided a telephone statement and scheduled to provide an in-person statement on May 4, 2016. On May 2, 2016, a second text message was sent to § 87(2)(b) reminding her of her appointment. On April 29, 2016, a text, letter, and email were sent to § 87(2)(b) including her appointment details. Between May 4, 2016, and May 12, 2016, four additional calls were placed to § 87(2)(b) Each time the calls were forwarded to voicemail and messages were left for § 87(2)(b) On May 4, 2016, a missed appointment letter and email were sent to § 87(2)(b) To date § 87(2)(b) has not responded to these contact attempts.
- § 87(2)(b) did not cooperate in this investigation. On March 1, 2016, contact was established with § 87(2)(b) who scheduled to provide an in-person statement on March 7, 2016. On March 1, 2016, a text message was sent to § 87(2)(b) including her appointment details. An email and a please-call letter edited to include her appointment details were also sent to her on March 1, 2016. On March 5, 2016, a text message reminder of this appointment was sent to § 87(2)(b) § 87(2)(b) missed this appointment without providing cancellation. On March 7, 2016, a third call was placed to § 87(2)(b) and a voice message was left for her. On March 7, 2016, a missed appointment letter was mailed to § 87(2)(b) On March 10, 2016, a fourth call was placed to § 87(2)(b) who rescheduled to provide an in-person statement on March 21, 2016. § 87(2)(b) did not appear for this second scheduled appointment and did not call to cancel. As such, no in-person statement was obtained from § 87(2)(b)

- § 87(2)(b) did not cooperate in this investigation. On March 1, 2016, contact was established with § 87(2)(b). § 87(2)(b) declined to provide a statement, or more complete contact information, as she feared officers might retaliate against her for filing a complaint. § 87(2)(b) was assured that the CCRB is independent of the IAB, and that allegations of harassment are referred to IAB, and that she should notify the CCRB immediately if she experienced harassment. § 87(2)(b) requested a call back on March 2, 2016, to provide a statement. On March 2, 2016, the investigator called § 87(2)(b) back as she requested and reached her voicemail, which was full and could not accept messages. § 87(2)(b) called back immediately thereafter and said that she was busy at the moment but that she would call back again in about 10 minutes. § 87(2)(b) did not call back as promised. On March 4, 2016, § 87(2)(b) was called a third time and again her voicemail box was full and could not accept messages. On March 8 and March 10, 2016, two further calls were placed to § 87(2)(b) and two voice messages were left for her requesting a call back. On March 1 and March 8, 2016, two please-call letters were mailed to § 87(2)(b) neither of which was returned as undeliverable. Because § 87(2)(b) has not to date contacted the CCRB, the investigation was unable to obtain either a telephone or in-person statement from her.
- Due to a lack of cooperation from § 87(2)(b) and § 87(2)(b) and § 87(2)(b) inability to identify the other party guests, the investigation was unable to identify many of the potential victims of the pepper spray.
- On March 1, 2016, field work was conducted to § 87(2)(b) in Queens to obtain video footage from the § 87(2)(b) floor (BR 08). It was found that the building manager had improperly saved the file onto a USB, so that the file was corrupted and could not be played. On March 2, 2016, attempts were made to locate the file on DVR with building management and download it correctly, but by that date the video footage was expunged (BR 09).
- § 87(2)(b) provided two video files that she recorded of the incident. One of them was filmed inside of § 87(2)(b) well after the pepper spray was discharged (BR 02). Although it depicts officers inside of the apartment, it does not depict how officers gained access to the apartment, § 87(2)(g). The second video file depicts officers standing in front of the building § 87(2)(g) (BR 03).

Findings and Recommendations

Explanation of Subject Officer Identification

- **Pepper spray:** § 87(2)(b) did not actually see which officer discharged the pepper spray. § 87(2)(g)
- **Entry:** As will be discussed in greater detail below, none of the civilians who provided statements saw or knew how officers gained entry into the apartment. § 87(2)(g)

Allegations not pleaded

- **Entry:** In initially filing this complaint (BR 01), § 87(2)(b) said that officers broke through the door of the apartment and discharged pepper spray inside of the apartment. When contacted by telephone on March 1, 2016 (BR 10), § 87(2)(b) said that he did not actually see how officers came to be inside the apartment, nor did he actually see officers discharge pepper spray. In her telephone statement, § 87(2)(b) (BR 11) did not allege this. § 87(2)(b) (BR 12 and 13) did not see how officers came to be in the apartment. § 87(2)(b) did not provide a statement. § 87(2)(b) (BR 35) did not allege this. All officers interviewed denied forcefully entering § 87(2)(b), in Queens and discharging pepper spray inside of it. No such allegation is depicted in the video footage. § 87(2)(g)
- **Pepper spray:** In her telephone statement, a witness, § 87(2)(b) (BR 15), claimed she saw eight or nine police officers all discharge their pepper spray in the hallway. § 87(2)(g)

Allegation A – Force: Police Officer Joseph Foss used pepper spray against § 87(2)(b) and individuals.

It is not disputed that PO Foss discharged his pepper spray in the hallway outside of § 87(2)(b) in Queens.

§ 87(2)(b) (BR 12 and 13), the only civilian to cooperate with the investigation, said that she went to a children’s birthday party at the aforementioned location. When § 87(2)(b) first arrived to the building, she had observed in the lobby a verbal dispute between a woman and other individuals who § 87(2)(b) did not know. § 87(2)(b) went upstairs to § 87(2)(b) and did not see further what occurred during this verbal dispute.

§ 87(2)(b) knew only a few people present: her neighbor, § 87(2)(b)’s son or grandson, identified by the investigation as § 87(2)(b) and § 87(2)(b)’s daughter, § 87(2)(b). In total there were approximately 30 to 40 people present, including several children. There was music on a DJ system at the party, which § 87(2)(b) acknowledged was somewhat loud, but the music had been turned down by the time the police officers arrived. § 87(2)(b) did not know if alcohol was served at the party.

After § 87(2)(b) had been at the party for about an hour, or at approximately 10 p.m., the police arrived. § 87(2)(b) only became aware of their presence after someone – she did not know who – said that the police were present, and they had not let them into the apartment. § 87(2)(b) wanted to go outside to have a cigarette, and so she exited the apartment. § 87(2)(b) followed behind § 87(2)(b)

When § 87(2)(b) and § 87(2)(b) exited § 87(2)(b), the door shut behind them. Once out in the hallway, § 87(2)(b) saw approximately 9 or 10 officers standing in the hallway. § 87(2)(b) also saw a female in the hallway. § 87(2)(b) does not know this female, but believes that she resides in the building, and has had problems with § 87(2)(b) in the past. The female began screaming and threatening to fight § 87(2)(b). § 87(2)(b) began to scream back at the female. § 87(2)(b) tried to convince § 87(2)(b) to go back inside by pushing and elbowing her back towards the closed apartment door, and by positioning herself in between § 87(2)(b) and the female with her back to the apartment door. The dispute did not become physical.

After approximately two minutes, § 87(2)(b) believed § 87(2)(b) turned to back inside of the apartment, opening her apartment door, though § 87(2)(b) did not actually see this because § 87(2)(b) back was to § 87(2)(b) and the apartment door at this time; § 87(2)(b) believed the apartment door was open mainly because she could hear the voices of children from inside the apartment again. Two seconds later, § 87(2)(b) felt a burst of pepper spray on her right temple. § 87(2)(b) did not see which officer discharged the pepper spray. § 87(2)(b) heard no warning before the pepper spray was used. § 87(2)(b) could not tell if anyone else was pepper sprayed at this time. § 87(2)(b) could not see once she was pepper sprayed. § 87(2)(b) went back inside the apartment and eventually went to the bathroom to wash her eyes out. § 87(2)(b) claimed that she went to an ambulance on scene, and received from them a washcloth for her eyes, but that they § 87(2)(b) to take her to the hospital, and that she therefore received no further medical treatment. § 87(2)(b) believed that some of the children inside of the apartment had been affected by the pepper spray as well, but did not know who these children were.

The Ambulance Call Report was requested from FDNY. While FDNY determined that the responding ambulances were not from FDNY but from a private hospital, but were still able to provide the EMS communications report, which indicated that ambulances were called for someone having difficulty breathing and that the job was ultimately classified as unfounded (BR 20).

§ 87(2)(b) (BR 11) said that she was inside of the apartment when she heard police begin banging on the door. § 87(2)(b) went to the door and opened it over the protestations of many other people present at the party. Almost immediately upon opening the door, § 87(2)(b) was pepper sprayed. § 87(2)(b) did not see who discharged the pepper spray. As was previously discussed, § 87(2)(b) did not ultimately cooperate with the investigation.

§ 87(2)(b) (BR 35) said she was at the party and opened the door to leave. § 87(2)(b) thought she was standing near § 87(2)(b) mother at the time (although § 87(2)(b) did not know § 87(2)(b) mother's name, the investigation identified her as § 87(2)(b). As soon as she opened the door, she felt a burning sensation on her eyes from the pepper spray. § 87(2)(b) did not see which officer discharged the pepper spray, and did not hear any warning given. The door of the apartment was shut again immediately thereafter. § 87(2)(b) eventually went downstairs, spoke with an officer, identified by the investigation as Sgt. Felton, who encouraged her to obtain treatment from an ambulance parked at the scene. An EMT gave § 87(2)(b) milk with which to wash out her eyes.

As was discussed above, § 87(2)(b) (BR 10) was in the back of the apartment and did not see any officer discharge pepper spray, though he did hear people screaming that they had been pepper sprayed.

Again, as was discussed above, the investigation was never able to establish contact with § 87(2)(b).

The EVENT reports (BR 21 to 22) and communications CD (BR 23 to 30) reflect that two individuals called 911 to complain about the party, prompting the police to respond to the scene as a 10-39, or other crime.

One individual told 911 that the people in § 87(2)(b) were having a loud party with many people – he guessed that there were 100 people – that was spilling out into the hallway and was turning into a major fight (BR 25). § 87(2)(b), § 87(2)(f)

§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b) he heard what

sounded like a fight, with many people arguing, cursing, and threatening one another. The individual did not look out of his apartment to see what was going on at that time, but decided to call 911 to report the fight because he felt the situation was getting out of control. After about 10 minutes, the individual heard the police arrive. Although the individual remained in his apartment, he could tell that the officers were present because the fight stopped, the party grew quiet, he heard the sounds of police radios, and heard someone say, "I'm going to ask you to keep it down, and that you go." The individual then heard, but did not see, a female abruptly scream, "What the fuck are you still doing in front of my fucking door?" The individual then heard loud and indistinct sounds of multiple people screaming. The individual was not aware of officers ever using pepper spray.

A second caller told 911 that it was too loud in her building and that she did not know what was going on, but that it sounded like there was going to be a big fight (BR 26). The female provided her last name as § 87(2)(b). When contacted at the number obtained by 911 (BR 15), the investigation reached a female who identified herself as § 87(2)(b).

§ 87(2)(b) was just arriving home at approximately 10 p.m. when she observed eight or nine police officers in the § 87(2)(b) floor hallway. As § 87(2)(b) walked to her apartment, she saw all eight or nine police officers discharge their pepper spray at unknown individuals in the apartment. § 87(2)(b) did not hear or see any civilians fighting amongst themselves. § 87(2)(b) never saw the officers go inside the apartment. § 87(2)(b) immediately entered her apartment and did not see what else occurred.

As was previously discussed, the investigation was unable to obtain video footage from the building's cameras on the second floor (BR 08 and 09). The video footage provided by § 87(2)(b) does not depict this allegation (see above files labeled 201601572_20160427_1723_DM and 201601572_20160427_1718).

PO Roehrig (BR 18) received via radio a report of a 10-39, or 'other crime,' on the second floor of § 87(2)(b). PO Roehrig believed the report referred to some kind of fight or harassment at the location. PO Roehrig arrived simultaneously with PO Foss and his partner. The music from the party was loud enough to be audible to PO Roehrig even before he actually arrived at the location.

PO Roehrig went to the second floor and knocked on the door of § 87(2)(b) where the music seemed to be coming from. A female unknown to PO Roehrig answered the door. When the female opened the door, PO Roehrig could see that there were numerous people packed into the apartment, as well as what appeared to be a DJ booth. PO Roehrig asked her to turn down the music. PO Roehrig also asked the female about the 10-39. The female refused to turn down the music, and did not provide any information about the 10-39, before she shut the door.

There was another female standing in the hallway on the second floor. After reviewing her CCRB photograph, PO Roehrig identified this female as § 87(2)(b). PO Roehrig asked § 87(2)(b) about the 10-39, and § 87(2)(b) said that there had been a verbal dispute between unknown individuals, but that nothing had come of it. PO Roehrig tried to have § 87(2)(b) mediate between the officers and the party attendees to see if they could lower the music or have the guests begin to disperse. § 87(2)(b) agreed to try to talk to the party attendees.

While PO Roehrig spoke to § 87(2)(b) a group of approximately four or five unknown females arrived in the second floor hallway and approached the door to § 87(2)(b). The door of § 87(2)(b) opened and PO Roehrig saw the same female who had refused to turn down the music. The female began to argue with the group of females. As they argued, numerous people

began to emerge from the apartment, some of whom themselves became involved in the dispute. The dispute began to turn physical, with people pushing and shoving each other. The hallway outside of § 87(2)(b) is very narrow. PO Roehrig and the other officers tried to get the group to stop fighting by saying, “Please, stop.”

PO Roehrig, who was standing closest to § 87(2)(b) moved forward to try to separate § 87(2)(b) from the dispute. PO Roehrig explained that because § 87(2)(b) had agreed to mediate the situation, he did not want her to become involved in the dispute and then no longer be able to assist them. As PO Roehrig moved forward, he became caught up in the number of people exiting the apartment. PO Roehrig simultaneously felt someone – he assumed it was an officer, but did not see which – pull him backwards. PO Roehrig then saw a burst of pepper spray traveling over his head and onto the group of people having the dispute. PO Roehrig believed the door to the apartment was open at this time, because people were still exiting the apartment. PO Roehrig did not see who discharged the pepper spray, but later learned that PO Foss had discharged it.

PO Roehrig and his fellow officers then retreated to the stairwell. They did so to avoid being effected by the pepper spray themselves and because it was tactically unsafe for them to enter an uncontrolled crowd of 50 people who were pushing and shoving each other. PO Roehrig thought it was possible that one of the members of the crowd possibly would have tried to grab his weapon to use in the fight had he not been pulled back.

§ 87(2)(g) PO Foss explained that when PO Roehrig moved forward, he pulled him backwards. PO Foss warned, “I’m deploying mace.” A few of the people in the dispute stepped back, but most did not react to this warning. PO Foss then discharged his pepper spray at the group of people disputing. PO Foss felt that pepper spray was the proper level of physical force to use in this situation. PO Foss was concerned that if officers began trying to stop the physical dispute by engaging the crowd with physical impact techniques, this would only further enrage an irate crowd and worsen the risk to officer safety, given that officers were severely outnumbered at that time. Aside from attempting to end the dispute efficiently, PO Foss had no other reason to discharge his pepper spray. The dispute stopped immediately after PO Foss discharged his pepper spray. PO Foss has received training before on when to use pepper spray both at the police academy and possibly again at another point that he did not recall. PO Foss has never received training on the use of pepper spray in crowd situations, and has only received instruction on this topic in terms of its place on a continuum of force.

Sgt. Wong (BR 19) and Sgt. Felton (BR 17) were not present on the § 87(2)(b) floor at the time this allegation occurred.

Pepper spray may be used when a police officer reasonably believes it is necessary to effect an arrest of a resisting suspect, for self-defense or defense of another from unlawful force, or to take a resisting emotionally disturbed person into custody. In many cases, pepper spray will reduce or eliminate the need for substantial physical force, and will often reduce the potential for injuries to members and suspects that might result from physical restraint and should be regarded as a possible alternative to such force and restraint, where practical. Pepper spray may be used in arrest or custodial restraint situations where physical presence or verbal commands have not been, or would not be, effective in overcoming physical resistance. Avoid discharging pepper spray indiscriminately over a large area for disorder control. Members who are specifically trained in the use of pepper spray for disorder control may use pepper spray in accordance with their training, and within Department guidelines, and as authorized by supervisors. In addition, avoid

using pepper spray in small, contained areas, such as automobiles and closets. Patrol Guide Section 212-95 (BR 31)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

Allegation B – Abuse of Authority: Sergeant Christopher Felton entered and searched § 87(2)(b), in Queens.

It is undisputed that multiple minutes after the pepper spray was discharged, Sgt. Felton entered § 87(2)(b), followed by additional officers. § 87(2)(g)

§ 87(2)(b) (BR 12 and 13) said that after she was pepper sprayed, she went to the bathroom to wash her face. By the time § 87(2)(b) emerged from the bathroom, she saw Sgt. Felton and multiple other officers standing in the apartment. § 87(2)(b) did not see how Sgt. Felton gained access to the apartment.

§ 87(2)(b) filmed Sgt. Felton on her cell phone (see above file labeled 201601572_20160427_1723). Video footage documents that Sgt. Felton, PO Roehrig, PO O'Rourke, and at least one other unidentified uniformed officer were standing just inside the door of the apartment, while other officers, including Sgt. Wong, are visible standing outside the apartment in the hallway. The video footage does not depict how officers came to be in the apartment. It also does not depict any civilians protesting the officers' presence in the apartment. Sgt. Felton appears to be speaking with an unidentified female inside the apartment. Their conversation is not audible over the general noise inside the apartment.

§ 87(2)(b) said that there were children in the apartment, some of whom seemed to be effected by the pepper spray insofar as she heard them screaming, but she did not actually observe any other signs that they had been pepper sprayed.

§ 87(2)(b) (BR 10) in his telephone statement said that he was in the back of the apartment and did not see how officers entered. § 87(2)(b) (BR 11) in her telephone statement said that after she was pepper sprayed, she immediately went to the bathroom at the back of the

apartment, and did not see how or if any officers entered the apartment. The investigation was unable to obtain a statement from § 87(2)(b) § 87(2)(b) (BR 35) did not allege an entry. The unidentified individual (BR 14) who lives across the hall remained inside his apartment throughout this incident and never saw officers go inside § 87(2)(b) § 87(2)(b) (BR 15), who also lives across the hallway, entered her own apartment immediately after the pepper spray was discharged and never saw any officers go inside.

Sgt. Felton (BR 17) said that he did not arrive at § 87(2)(b) until the pepper spray had been discharged. There was a large crowd of people gathered in front of the location who were irate in that they were arguing amongst themselves and also making anti-police comments, such as, “Fuck the police.” Sgt. Felton moved through the crowd to the entrance of § 87(2)(b) looking for Sgt. Wong, who he knew to be on scene. As Sgt. Felton moved through the crowd, he encountered a female who stood out amongst the crowd as being especially upset. Sgt. Felton spoke to this woman, who explained that officers had discharged pepper spray.

The woman began walking into the building. Numerous people were still emerging from the building. Sgt. Felton followed her, still looking for Sgt. Wong. When they reached the stairwell to the second floor, Sgt. Felton overheard someone – he could not tell who was speaking or where the voice was coming from – scream, “Fuckin’ cops maced one of my kids. Kid is having an asthma attack upstairs.” Sgt. Felton turned to the female that he had followed into the building and said, “Listen, someone’s kid is having an asthma attack. I need to get upstairs to the apartment.”

Sgt. Felton followed this woman up to § 87(2)(b). Upon arrival, Sgt. Felton heard someone say, “Shut the fucking door. Cops can’t fucking come in here.” The door to the apartment then closed. Sgt. Felton had not been able to see into the apartment before the door closed, as it had only been open by a crack. Sgt. Felton could not tell from outside of the apartment whether there were children in the apartment or not.

Sgt. Felton turned to the woman he was with and said, “Listen, I need to get in there to make sure the kids are okay.” The woman replied that the people inside did not want officers in the apartment. Sgt. Felton told the woman that he could not leave until he made sure that the kid was okay. The woman said, “Hold on. I’m going to go inside,” and may have told Sgt. Felton that she was going to talk to the owner of the apartment to see if Sgt. Felton could come in. The woman entered the apartment and shut the door behind her. Between two and five minutes later, the woman reemerged from the apartment and told Sgt. Felton, “Okay. No one can come in but you.” Sgt. Felton was not sure what this woman’s relationship to the apartment or its owner was, i.e. if she lived there or was a guest.

Sgt. Felton told the officers that he was with that he was going to enter the apartment, and then entered. Upon entry, Sgt. Felton stayed in the living room, which was the first room upon entry. Sgt. Felton observed approximately three or four children, none of whom appeared to have been harmed by pepper spray, as well as two adult females who Sgt. Felton could not identify, inside the apartment. Sgt. Felton asked if everyone was okay. The two adult females said that everyone was okay. Aside from making sure that the kids were okay, Sgt. Felton had no other reason to enter the apartment. Sgt. Felton did not do anything else inside the apartment aside from confirm that the children were okay. Sgt. Felton did not remember any other officers entering the apartment behind him, and said because he entered first would not have been able to tell what was happening behind him. At no point after Sgt. Felton entered did he hear anyone protesting about the entry of any additional officers. Once Sgt. Felton was assured that the children were okay, he

left the apartment. Sgt. Felton reviewed the video footage, which did not refresh his recollection as to the presence of other officers in the apartment.

PO Roehrig (BR 18) said he was with Sgt. Felton when he went back upstairs, and that they proceeded back upstairs because they had overheard people in the crowd complaining that there were people injured from the pepper spray still in the apartment. PO Roehrig believed that a civilian – he could not identify who – granted permission for Sgt. Felton to enter the apartment. PO Roehrig did not know what was said specifically to grant this consent, because he was not the primary contact officer. PO Roehrig believed that he stayed in the living room while Sgt. Felton went to the back of the apartment to make sure that everyone there was okay and did not need medical attention. After less than ten minutes, Sgt. Felton reemerged from the back of the apartment with an unidentified female who complained of having been pepper sprayed so they could escort her downstairs to the ambulance. Ultimately this woman refused medical attention and refused to provide her name to officers.

Sgt. Wong (BR 19) said that though he had initially responded to the second floor with PO Foss and PO Roehrig, he had been called via cell phone to address an unrelated issue on the first floor by one of his officers, PO Mercurio, and therefore was not present to witness the use of pepper spray. Sgt. Wong did not believe he ever went back up to the apartment, and never saw officers inside of it. Reviewing video footage, which depicts Sgt. Wong standing outside the apartment, did not refresh his recollection.

A warrantless entry and search of a private home is presumed unconstitutional. Exceptions to this rule include circumstances of consent, emergencies, exigent circumstances, and hot pursuit. There are three elements to determine whether an entry is justified under an emergency exception: the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, the search must not be primarily motivated by intent to arrest and seize evidence, there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or the place to be searched. People v. Mitchell, 39 NY2d 173, 177-178 (BR 32) Absent a valid search warrant or exigent circumstances, consent is required to search a location. People v. Lewis, 462 N.Y.S.2d 884 (1983 – 1st Dept.) (BR 33) In order to obtain consent, the police must reasonably believe that the person granting consent has apparent authority over the premises. People v. Vasquez, 298 A.D.2d 230 (2002) (BR 34)

§ 87(2)(g)

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Signature

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